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Gender Equality and the First Amendment: Foreword

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SYMPOSIUM
GENDER EQUALITY AND THE
FIRST AMENDMENT

FOREWORD

Jeanmarie Fenrich, Benjamin C. Zipursky**
& Danielle Keats Citron****

Gender equality demands equal opportunity to speak and be heard. Yet, in recent years, the clash between equality and free speech in the context of gender has intensified—in the media, the workplace, college campuses, and the political arena, both online and offline. The internet has given rise to novel First Amendment issues that particularly affect women, such as nonconsensual pornography, online harassment, and online privacy. On November 1–2, 2018, the *Fordham Law Review* brought together scholars and practicing lawyers from around the nation to address many of the pressing challenges facing feminists and free speech advocates today. The Symposium was a fitting topic to mark the occasion of 100 years of women at Fordham Law School.

Over twenty scholars, practitioners, and writers participated in the two-day conference, along with Sylvia A. Law, Elizabeth K. Dollard Professor of Law, Medicine, and Psychiatry Emerita of N.Y.U. School of Law, who delivered the Robert L. Levine Lecture.¹ Conference panels considered campus speech issues, including trigger warnings, safe spaces, and hostile classrooms; pornography, including nonconsensual pornography (or “revenge porn”); being female online and how the internet affects women’s reputations, self-expression, and privacy; words, images, misogyny, and the First Amendment; and how gender representation in the media and politics impact political outcomes and reproductive rights.

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1. Sylvia A. Law, *Income Disparity, Gender Equality, and Free Expression*, 87 *FORDHAM L. REV.* 2479 (2019).

This issue of the *Fordham Law Review* includes papers from six of the Symposium participants,² in addition to Professor Law's Levine Lecture.³

In "When Law Frees Us to Speak," Professors Danielle Keats Citron and Jonathon W. Penney argue that "law has a crucial expressive function in combating online abuse."⁴ Women and marginalized groups often retreat from online engagement in the face of cyberharassment and invasions of their sexual privacy.⁵ This Article presents original empirical research showing law's salutary effects on women's online expression.⁶ It also focuses on another dimension of cyberharassment law: its ability to empower victims to speak.⁷

In "American Courts and the Sex Blind Spot: Legitimacy and Representation," Professor Michele Goodwin and Mariah Lindsay start with the "enduring problem of women's marginal inclusion in government"⁸ and the resulting policies, legislation, and judicial opinions that perpetuate sex inequality and harm women's interests.⁹ Professor Goodwin and Ms. Lindsay go on to consider the problem of homogeneity in the judiciary generally and women's underrepresentation in the judiciary in particular.¹⁰ They are particularly interested in the voting patterns of women judges appointed by Republican presidents, and they conducted a two-year empirical study examining the voting records of federal circuit judges in abortion cases to determine whether women judges are more likely to protect reproductive health rights than their male colleagues.¹¹ The study found that women judges appointed by conservative presidents were more committed to and protective of women's autonomy and reproductive rights than their male counterparts, demonstrating the significance of having adequate representation of women judges to promote sex equality and to protect reproductive rights.¹²

Professor Linda C. McClain considers whether the First Amendment, as judicially interpreted, has been a roadblock to gender equality in "'Male Chauvinism' Is Under Attack from All Sides at Present": *Roberts v. United*

2. Danielle Keats Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. 2317 (2019); Michele Goodwin & Mariah Lindsay, *American Courts and the Sex Blind Spot: Legitimacy and Representation*, 87 FORDHAM L. REV. 2337 (2019); Linda C. McClain, "'Male Chauvinism' Is Under Attack from All Sides at Present": *Roberts v. United States Jaycees, Sex Discrimination, and the First Amendment*, 87 FORDHAM L. REV. 2385 (2019); Helen Norton, *Pregnancy and the First Amendment*, 87 FORDHAM L. REV. 2417 (2019); Lynne Tirrell, *Toxic Misogyny and the Limits of Counterspeech*, 87 FORDHAM L. REV. 2433 (2019); Keith E. Whittington, *Free Speech and the Diverse University*, 87 FORDHAM L. REV. 2453 (2019).

3. Law, *supra* note 1.

4. Citron & Penney, *supra* note 2, at 2320.

5. *See id.*

6. *See id.* at 2331–33.

7. *See id.* at 2327.

8. Goodwin & Lindsay, *supra* note 2, at 2342.

9. *Id.* at 2341–44.

10. *See generally id.*

11. *See id.* at 2372.

12. *See id.* at 2373.

States Jaycees, Sex Discrimination, and the First Amendment.”¹³ In particular, Professor McClain is interested in the freedom of association protection afforded by the First Amendment as articulated in *Roberts v. United States Jaycees*¹⁴ and its complicated relationship to ensuring equal citizenship and gender equality for women.¹⁵

Professor Helen Norton also addresses reproductive rights in relation to speech in “Pregnancy and the First Amendment.”¹⁶ In particular, her Essay considers First Amendment jurisprudence with respect to reproductive health care providers.¹⁷ Professor Norton reviews U.S. Supreme Court jurisprudence in this area and concludes that existing law ignores pregnant women’s First Amendment interests as listeners who would benefit from receiving information relevant to their health-care choices.¹⁸ She argues that the First Amendment requires the government to identify itself as the source when it speaks to pregnant women about their reproductive-health options. Relatedly, Professor Norton contends, the First Amendment allows the government to ensure that health-care providers give accurate and relevant information to pregnant women about reproductive-health decisions.¹⁹

Several papers tackle the complications of regulating speech that causes harm. In “Toxic Misogyny and the Limits of Counterspeech,” Professor Lynne Tirrell considers the harms inflicted by misogynist speech and the limits of counterspeech as a remedy, especially for vulnerable targets.²⁰ Professor Tirrell addresses the systemic enforcement of patriarchal power and subordination of women through words, images, and actions and argues for using the law, and language norms more broadly, to challenge speech and images that cause harm to women.²¹

In “Free Speech and the Diverse University,” Professor Keith E. Whittington challenges the claim that free speech and inclusivity should be regarded as conflicting values on campus.²² Rather, Professor Whittington maintains that both values are essential to advancing human knowledge and the free exchange of ideas.²³ He argues that universities should examine the central commitments of their institutions and how these relate to freedom of speech in order to adopt a statement of principles (as the University of

13. McClain, *supra* note 2.

14. 468 U.S. 609 (1984).

15. McClain, *supra* note 2, at 2388–89.

16. Norton, *supra* note 2.

17. *See generally id.*

18. *See id.* at 2431 (“What would the First Amendment law that applies to speech to pregnant women look like if we considered the First Amendment interests of pregnant women?”).

19. *See id.* at 2430–31.

20. Tirrell, *supra* note 2, at 2435 (“Counterspeech has limited power and reach, and often the most vulnerable targets of nasty speech are not in a position to reply with ‘more speech.’”).

21. *See id.* at 2451–52.

22. Whittington, *supra* note 2, at 2453 (“Much of the debate surrounding campus free speech in recent years has assumed that choices must be made between speech and inclusivity and has moved on to argue over which should take priority. It is a mistake to set these two values in conflict with one another.”).

23. *See id.* at 2454.

Chicago did in 2014).²⁴ Such a process would build consensus within the community and allow universities to ensure that their own policies and culture promote these agreed-upon values.²⁵ Professor Whittington also addresses the insufficiency of simply adopting a statement and discusses the importance of institutionalizing a culture of intellectual freedom that would allow students to understand how and why they should engage with challenging ideas.²⁶

In addition to the authors listed above, we would also like to thank the many other scholars and practitioners who presented at the Symposium: Amy Adler, Anita Allen, Corey Brettschneider, Susan Brison, Susan Buckley, Elisa D'Amico, Mary Anne Franks, Carrie Goldberg, Virginia Heffernan, Kate Klonick, Suzanne Nossel, Virginia Ryan, Nadine Strossen, and Nabiha Syed.

This final issue of Volume 87 of the *Fordham Law Review* honors the hundredth anniversary of Fordham Law School opening its doors to women by showcasing the varied and vibrant scholarship of Fordham women. This Symposium is published alongside an Article by Fordham Law professor Aditi Bagchi, which proposes that manufacturers of consumer goods should be civilly liable for the conditions under which those goods are made;²⁷ and five student Notes,²⁸ all written by women, on topics ranging from New York City's regulation of Airbnb²⁹ to the federal taxation of cryptocurrency.³⁰ It is also accompanied by a *Fordham Law Review Online* Symposium collecting scholarship by women Fordham Law professors and women editors and alumnae of the *Law Review*.³¹

24. *See id.* at 2458–60.

25. *See id.* at 2460–61.

26. *See id.* at 2463–65.

27. Aditi Bagchi, *Production Liability*, 87 FORDHAM L. REV. 2501 (2019).

28. Claire Abrahamson, Note, *Guilt by Genetic Association: The Fourth Amendment and the Search of Private Genetic Databases by Law Enforcement*, 87 FORDHAM L. REV. 2539 (2019); Tess Hofmann, Note, *Airbnb in New York City: Whose Privacy Rights Are Threatened by a Government Data Grab?*, 87 FORDHAM L. REV. 2589 (2019); Daniela C. Manzi, Note, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623 (2019); Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653 (2019); Danhui Xu, Note, *Free Money, but Not Tax-Free: A Proposal for the Tax Treatment of Cryptocurrency Hard Forks*, 87 FORDHAM L. REV. 2693 (2019).

29. Hofmann, *supra* note 28.

30. Xu, *supra* note 28.

31. For an overview of the *Online Symposium*, see Elizabeth B. Cooper, *100 Years of Women at Fordham: A Foreword and Reflection*, 87 FORDHAM L. REV. ONLINE 39 (2019).